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10 **CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD**  
11 **CENTRAL VALLEY REGION**

12 In the Matter of the Administrative  
13 Civil Liability Complaint

14 ) Complaint No. R5-2016-0512

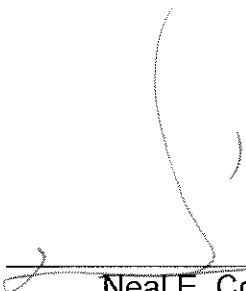
15 ) **APPLICATION OR MOTION TO**  
16 ) **DISMISS THE COMPLAINT FOR**  
17 ) **FAILURE TO COMPLY WITH WATER**  
18 ) **CODE §13323 OR FOR A SEPARATE**  
19 ) **HEARING TO DETERMINE IF THE**  
20 ) **ACL IS BARRED BY LACHES**

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Hearing: April 21 / 22, 2016

19 The Malaga County Water District ("District"), the party against whom the  
20 Administrative Civil Liability Complaint RS-2016-0512 ("ACL" or "Complaint") is  
21 directed, applies for an order of this Regional Board (the "CVRB" or "Board") to dismiss  
22 the Complaint described herein for failure to comply with requirements of §13323 or to  
23 schedule a separate hearing to determine whether the ACL is barred by laches. This  
24 Motion or Application is based on this Motion, the Memorandum of Points and  
25 Authorities submitted herewith, and all of the documents lodged with the Board in the  
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1 matter herein.

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3 Dated: March 11, 2016

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6 Neal E. Costanzo, Attorney for  
7 Malaga County Water District  
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1 **MEMORANDIUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION**  
2 **OR APPLICATION TO DISMISS.**

3 **I.**  
4 **INTRODUCTION**

5 California Water Code ("WC") §13323(a) reads as follows: "Any Executive  
6 Officer of a Regional Board may issue a Complaint to any person on whom  
7 Administrative Civil Liability may be imposed pursuant to this Article. The Complaint  
8 shall allege the act or failure to act that constitutes a violation of the law, the provision  
9 of law authorizing civil liability to be imposed pursuant to this Article, and the proposed  
10 civil liability."  
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12 The Complaint which was mailed by certified mail on or about January 27, 2016,  
13 consists of the Complaint, along with two attachments which contain several hundred  
14 pages of attached or "tabbed" documents. The Complaint appears to be a new type of  
15 Complaint specifically designed to target the Malaga County Water District and in fact  
16 states that "[t]his is the first Administrative Civil Liability Complaint for violations of a  
17 Pretreatment Program the Central Valley Water Board has undertaken." The ACL also  
18 states that "the Assistant Executive Officer has elected to treat all of the Code of  
19 Federal Regulation and 2008 permit pretreatment violations as a single group violation-  
20 Violation 1. (ACL at p.10.) "But the ACL fails to state, on its face, with any particularity  
21 or clarity, the act or failure to act by the District that constitutes a violation of the law  
22 and the provision of law authorizing civil liability to be imposed.  
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25 **II.**  
26 **GOVERNING LAW AND PROCEDURE**  
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1 As stated above, the ACL is issued pursuant to Water Code §13323. (ACL at  
2 page.1) According to the ACL, “[t]his Complaint is based on findings that the  
3 Discharger violated provisions of waste discharge requirements (“WDRs”) Order #R5-  
4 2008-0033 (NPDES #CA0084239)(the “2008 permits”), and Cease and Desist Order  
5 (“CDO”) #R5-2008-0032 (the “2008 CDO”).) (Ibid) The ACL recites several provisions  
6 or excerpts from the Water Code and the Federal Pretreatment Requirements of 40  
7 CFR part 403. The ACL under the heading “**SUMMARY OF ALLEDGED VIOLATIONS**  
8 **AND MAXIMUM AND MINIMUM ADMINISTRATIVE CIVIL LIABILITY**” at paragraph  
9 27 states “The violations and corresponding proposed penalty amounts that are  
10 summarized here are described in detail in Attachment A. The maximum penalties  
11 represent the statutory maximum imposed per day pursuant to Water Code §13385  
12 and Water Code §13350, respectively. The minimum penalties are based on the  
13 Enforcement Policy’s requirement to assess a liability of at least the amount of  
14 economic benefit associated with the violation plus 10%. The proposed penalties take  
15 into account the factors proscribed under Water Code §13385(e) and the Enforcement  
16 Policy.” Then, as described above, the ACL states, at paragraph 28, that, “Essentially,  
17 and for the limited purpose of this particular proceeding only, the Assistant Executive  
18 Officer has elected to treat all of the Code of Federal Regulation and 2008  
19 Pretreatment Violations as a single, group violation – Violation #1.” Violation #2 is  
20 described as addressing the Discharger’s separate and distinct violations of the Central  
21 Valley Water Board’s 2008 CDO.” (ACL at paragraph 28.) Violation #1 is listed as  
22 “**Violation 1:** Failure to implement a legally sufficient pretreatment program[.]” and then  
23 lists seven purported violations A through G.” Violation #2 is listed as “**Violation 2:**

1 Failure to submit Pretreatment and Disposal Capacity Study and propose a work plan  
2 as required by the 2008 CDO.”

### 3 4 III. ARGUMENT.

5 A. THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE COMPLAINT  
6 FAILS TO ALLEGE THE ACT OR FAILURE TO ACT THAT CONSTITUTES A  
7 VIOLATION OF LAW, AND THE PROVISION OF LAW AUTHORIZING CIVIL  
8 LIABILITY TO BE IMPOSED.

9 As stated above, WC §13323 requires that a ACL allege the act or failure to act  
10 that constitutes a violation of law and the provision of law authorizing civil liability to be  
11 imposed pursuant to Article 2.5 of Chapter 5 of Division 7 of the Water Code. While the  
12 ACL, including Exhibit 1 described as the detailed analysis of the individual permit  
13 component and CDL violations, references numerous statutes or excerpts of statutes, it  
14 fails to specifically allege what law or statute was violated and the provision of law  
15 authorizing civil liability to be imposed. For example, Violation 2 is set forth as follows:  
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18 **“Violation 2:** Failure to submit Pretreatment and Disposal Capacity Study  
19 and propose a work plan as required by the 2008 CDO.

20 The Discharger failed to submit a report required by the 2008 CDO evaluating  
21 WWTF Treatment and Disposal Capacity and to propose a work plan identifying  
22 short and long term measures to secure adequate treatment and disposal  
23 capacity for the volume, type and concentrations of wastes in the influent. The  
24 Discharger failed to comply with these 2008 CDO requirements since 14 June  
25 2008, the first date of non-compliance in regard to Task 3 of the 2008 CDO,  
26 through 4 December 2014 when the 2008 CDO was rescinded and replaced.  
27 The period of violation totals 2,365 days, which the prosecution team  
28 recommends reducing to 1,640 days as detailed in Attachment A. The maximum  
penalty for this violation is eight million two hundred thousand dollars.  
(\$8,200,000.00) The recommended total base liability for this violation is two  
hundred sixty one thousand three hundred sixty dollars (\$261,360.00).”

1 This purported violation simply fails to state what statute was violated and the  
2 provision of law authorizing the civil liability to be imposed which imposes an unduly  
3 burdensome requirement on the District to read through the Complaint and the  
4 hundreds of pages attached thereto in an attempt to ascertain what violation, if any  
5 occurred and what provision of law authorizes a civil liability to be imposed on it.  
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7 To carry the example a bit further, and assuming, for arguments sake, that  
8 Violation 2 is a failure or refusal to furnish technical or monitoring program reports as  
9 required by Subdivision (b) of WC §13267, it would follow that an administrative civil  
10 penalty may be imposed pursuant to WC §13268(a)(1). This is consistent with  
11 paragraph 19 of the ACL which states that "The Discharger's failure to timely submit  
12 monitoring and technical reports required by the 2008 CDO and 2008 Permit subjects it  
13 to civil liabilities under Water Code §13268." However, paragraph 27 of the ACL sets  
14 forth that the proposed penalty amounts, or at least the maximum penalties calculated,  
15 are calculated pursuant to WC §13385 and 13350. The calculation of the maximum  
16 penalty as set forth in Exhibit 1 for Violation 2 (referred to in Exhibit 1 as Violation #8)  
17 at page 38, references WC §13350 as permitting a civil liability in an amount up to five  
18 thousand dollars (\$5,000.) per day for the alleged violation which, as stated above,  
19 directly contradicts paragraph 19 of the ACL. Because the CVRB has failed to set  
20 forth, with any clarity or particularity, the alleged act or failure to act that constitutes a  
21 violation of law, and the provision of law authorizing a civil liability to be imposed as  
22 required by WC §13323 within the ACL, it fails to state any claim which the Board has  
23 authority to adjudicate. Moreover, by failing to identify the basis of the claim, the CVRB  
24 is imposing a burden on the District to search through hundreds of pages of  
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1 attachments and exhibits in order to determine what the alleged act or failure to act is  
2 and what provision of law the CVRB is alleging the District violated, even if it does so,  
3 as demonstrated above, the District cannot tell with any certainty what it is that it has  
4 allegedly done to violate any law.  
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6 B. THE PROCEEDING IS BARRED BY LACHES. THE ANALOGOUS  
7 STATUTE OF LIMITATIONS IS THE ONE YEAR PROVISION OF CCP §340(1) AND  
8 (2) AND THE EXISTENCE OF THIS ANALOGOUS STATUTE OF LIMITATIONS  
9 MAKES THE AGENCY'S DELAY INEXCUSABLE AS A MATTER OF LAW AND  
10 SHIFTS TO THE AGENCY THE BURDEN OF SHOWING MALAGA HAS NOT BEEN  
11 PREJUDICED BY THE DELAY. THE LACHES ISSUE IS REQUIRED TO BE TRIED  
12 BEFORE CONSIDERATION OF THE MERITS.

13 Statutes of limitations found in the Code of Civil Procedure do not literally apply  
14 to administrative proceeding because those statutes apply to civil actions and special  
15 proceedings of a civil nature and administrative proceedings are neither. (See *City of*  
16 *Oakland v. PERS* (2002) 95 Cal.App.4th 29; *Bernard v. Fong Eu* (1979) 100  
17 Cal.App.3d 511, 515; *Little Company of Mary Hospital v. Belshe* (1997) 53 Cal.App.4th  
18 325, 329).

19 Under appropriate circumstances, the defense of laches, however, operates in  
20 the same manner to bar a claim by a public administrative agency such as this Board if  
21 the requirements of unreasonable delay and resulting prejudice are met. (*Fountain*  
22 *Valley Regional Hospital and Medical Center v. Bonta* (1999) 75 Cal.App.4th 316, 323-  
23 324). Laches is designed to promote justice by preventing surprises through the  
24 revival of claims that have been allowed to slumber until evidence has been lost,  
25 memories have faded and witnesses have disappeared. It is unjust not to put the  
26 advisory on notice to defend even a just claim within the period of limitations and the  
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1 right to be free of stale claims in time comes to prevail over the right to prosecute them.  
2 (*Robert J. v. Catherine D.* (2009) 171 Cal.App.4th 1500, 1521).

3 It is well established that the elements of laches, unreasonable delay and  
4 resulting prejudice may be met in one of two ways. First, they may be demonstrated  
5 by the evidence, with the person arguing in favor of laches presenting proof of  
6 unreasonable delay and resulting prejudice. Second, the element of prejudice may be  
7 "presumed" whenever there exists a statute of limitations that is sufficiently analogous  
8 to the facts of the case and the period of that statute of limitations has been exceeded  
9 by the public administrative agency in making its claim. (See *Robert J.*, *supra*, at p.  
10 1522; *Fountain Valley*, *supra*, at p. 324; *Brown v. State Personnel Board* (1985) 166  
11 Cal.App.3d 1151, 1158-1161; *Stevedoring Services v. Prudential Lines Inc* (1986) 181  
12 Cal.App.3d 154, 158; *Gates v. Department of Motor Vehicles* (1979) 94 Cal.App.3d  
13 921).

14 In this second situation, the limitations is "borrowed" from the analogous statute  
15 and the burden of proof shifts to the administrative agency. To defeat the finding of  
16 laches, the agency, here this Regional Board, must show that the delay involved in the  
17 case was excusable and rebut the presumption that such delay resulted in prejudice to  
18 the opposing party, Malaga. (Id). In cases where there is no directly applicable statute  
19 of limitations such as administrative proceedings but a statute of limitations governs an  
20 analogous action of law, the statute of limitations time period is borrowed as the  
21 measure of the outer limit of reasonable delay in determining laches. (See *Brown*,  
22 *supra*, 166 Cal.App.3d at p. 1159-1160). Whether such borrowing occurs and whether  
23 there is a consequent transfer of the burden of proof on the claim of laches to the  
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1 administrative agency depends upon the strength of the analogy. (*Fountain Valley*,  
2 *supra*, at p. 325). The effect of the violation of an analogous statute of limitations is to  
3 shift the burden of proof to the plaintiff to establish that the delay was excusable and  
4 that the defendant was not prejudiced thereby. (*Id*; *Robert J.*, *supra*, at p. 1522). This  
5 is because the statute of limitations reflects a "legislative policy judgment that a delay"  
6 exceeding the time limit is "inherently unreasonable in the prosecution" of an  
7 administrative proceeding. (*Brown*, *supra*, at p. 1160).

8  
9 It is established law that where, as here, an administrative agency pursues a  
10 civil penalty, there is a directly analogous statute of limitations which is CCP §340. It  
11 provides that an action "upon a statute for penalty or forfeiture, when the action is given  
12 to an individual, or to an individual and the state, is one year. Subdivision (2) of that  
13 section provides that an action upon a statute for a forfeiture or penalties to the people  
14 of this state must be commenced within one year. (See *Myers v. Eastwood Care*  
15 *Center Inc.* (1981) 124 Cal.App.3d 491).

16  
17 It appears, although it is difficult, if not impossible to determine from the face of  
18 the Complaint, that all of the alleged violations took place between 2008 and 2012.  
19 Although there are vague references to some of the violations continuing into 2014,  
20 this appears to be nothing more than a sham effort to resurrect claims which are clearly  
21 barred by the doctrine of laches.  
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24 This is unreasonable delay as a matter of law. There is no excuse for this  
25 extreme delay, and the evidence submitted by the Prosecution Team offers no such  
26 excuse. Prejudice is presumed. Even if it were not, the CVRB as demonstrated by the  
27 "evidence" submitted by the Prosecution Team, has routinely been unresponsive or  
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1 responds only after extreme delay to the District including to responses to its purported  
2 Notices of Violation detailing why none of the violations ever even occurred. The CVRB  
3 cannot possibly overcome the presumption of prejudice and actual prejudice is  
4 apparent from the evidence that the Prosecution Team has submitted, including a  
5 provision in the 2008 Permit, which requires the retention of documents and records for  
6 a period of only three (3) years which makes it impossible, so many years after the  
7 alleged violations, for the District to marshal the evidence necessary to defend itself  
8 against the allegations in the ACL. (2008 NPDES Permit at p. D-5 at Section IV(A).)  
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11 Most importantly, in these circumstances where the existence of a defense to a  
12 claim which depends upon a determination of facts has been raised, that defense must  
13 be tried before the agency proceeds to any hearing on the merits. A hearing on the  
14 merits is patently premature and the agency has ministerial obligation to address the  
15 laches claim first, before proceeding to consideration of any other matter. (See  
16 *Piscioneri v. City of Ontario* (2002) 95 Cal.App.4th 1037, 1045-1049 ("factual  
17 underpinnings of a laches claim should initially be considered at an administrative  
18 hearing").  
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21 Given the presence of a directly analogous statute of limitations, without any  
22 evidence by the Prosecution Team that the extreme delay involved here is any sense  
23 excusable or that it can overcome the presumption of prejudice that clearly applies  
24 here, the CVRB is obligated to rule on the matter based on the undisputed facts shown  
25 above and dismiss this claim. If the agency takes any action other than dismissing this  
26 claim because it is barred by laches, Malaga is entitled to and hereby gives this agency  
27 notice of its intent to initiate a proceeding under Water Code §13320 based on the  
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1 action or failure to act by the CVRB and have a court order the CVRB to dismiss this  
2 proceeding.

3 In the analogous civil context, Malaga would be entitled to a separate prior trial  
4 on the laches question. (See CCP § 597; *Sahadi v. Soheaffer* (2007) 155 Cal.App.th  
5 709, 721). Further, in the analogous civil context, and in this administrative  
6 proceeding, Malaga is entitled to and does object to all of the Prosecution Team's  
7 evidence on the ground that none of it is relevant because the claim is completely  
8 barred by laches. (*Mize v. Reserve Life Insurance* (1975) 48 Cal.App.3d 487, 491).  
9 Malaga requests a separate hearing for a determination on the laches claim at the  
10 threshold of this proceeding.  
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13 **IV.**

14 **CONCLUSION.**

15 Based on the forgoing, the ACL fails to comply with Water Code §13323 in that  
16 the ACL does not allege the act or failure to act that constitutes a violation of law and  
17 the provision of law authorizing a civil liability to be imposed and therefore the  
18 Complaint should be dismissed. In the alternative, the CVRB should schedule a  
19 hearing to determine whether the Complaint should be dismissed because it is barred  
20 by the doctrine of laches before it conducts a hearing on the merits of the ACL.  
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24 Respectfully submitted,

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27 Date: \_\_\_\_\_

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Neal E. Costanzo, Attorney for  
Malaga County Water District

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